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Supreme Court of the United States

Supreme Court, U.S.
FILED
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——— Term, 1971

No. 71 - 587

~~OWNERS OR PARTIES IN INTEREST~~:
FRANKLIN TOWNSHIP, *Petitioner*

v.

BOROUGH OF DELMONT, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE ~~SUPREME~~ COMMONWEALTH COURT OF PENNSYLVANIA

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QUINN, GENT, BUSECK & LEEMHUIS
October, 1971

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

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v.

BOROUGH OF DELMONT, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Pennsylvania which quashed Petitioner's Appeal from a final order of the Commonwealth Court of Pennsylvania.

OPINIONS BELOW

The opinion of the Commonwealth Court is not reported and appears as Appendix D. The Order of the Supreme Court of Pennsylvania is not reported and appears as Appendix F hereof.

References to the record are made in the Appendices attached hereto.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on July 30, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED FOR REVIEW

(1) Was Petitioner deprived of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution where the Pennsylvania Supreme Court quashed its Appeal for late filing of an Appeal to the Commonwealth Court of Pennsylvania where the then counsel for Petitioner received no notice of the entry of the judgment from which the Appeal lay nor received any copy of the Order and Opinion from which the Appeal should be taken.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are contained in the Fourteenth Amendment to the United States Constitution. The Pennsylvania statutory provision involved in the Appeal to the Commonwealth Court of Pennsylvania is the Appellate Court Jurisdictional Act, Act of July 31, 1970, 17 P.S. 211.101-211.510.

STATEMENT OF THE CASE

This was an annexation case initiated by the Borough of Delmont to annex land in Franklin Township, Westmoreland County, Pennsylvania. On September 25, 1969, the enabling Ordinance was filed with the Court of Common Pleas of Westmoreland County. Within the statutory

period of 30 days, an appropriate Complaint-Appeal was filed by the Township of Franklin. On November 2, 1970, the Court of Common Pleas of Westmoreland County prepared a written Opinion and Order quashing the Appeal of Franklin Township (Appendix A) The Opinion and Order was improperly filed by the Secretary to the presiding Judge of the Court, with the Prothonotary of the Court of Common Pleas (Civil Division) rather than with the Clerk of Courts (Criminal Division). On November 4, 1970, the Prothonotary delivered the Opinion and Order dated November 2, 1970 to the Clerk (Criminal Division). No notice of the entry of the Opinion and Order was sent to counsel for the Township of Franklin by any Court official, nor did counsel receive any notice of any kind of the entry of the Opinion and Order, nor was any copy of the Opinion and Order of November 2, 1969 mailed or delivered to counsel for Franklin Township.

The first notice of any kind that counsel for Franklin Township received of the Opinion and Order of November 2, 1970, was on December 16, 1970 when the Opinion and Order was referred to in a Brief filed by a party in another separate annexation proceeding.

Counsel for Franklin Township then filed a Petition For Leave To File Appeal Nunc Pro Tunc, with the Commonwealth Court of Pennsylvania on December 22, 1970. Under Section 402 Appellate Court Jurisdiction Act of July 31, 1970, 17 P.S. 211.101-211.510, jurisdiction is conferred on the Commonwealth Court to hear Appeals from Orders of the Courts of Common Pleas. An Appeal should be filed within 30 days from the date of the entry of the Order of the Court below. On April 15, 1971, the Commonwealth Court entered its Order dismissing the Petition for leave to file the Appeal Nunc Pro Tunc and quashed the Appeal (Appendix B).

Appellant and present Petitioner, Franklin Township, filed its Petition For Allowance of Appeal Or Certiorari From Judgment Order Of The Commonwealth Court with the Supreme Court of Pennsylvania on May 10, 1971 (Ap-

pendix E.). On July 30, 1971, the Supreme Court of Pennsylvania entered an Order "Petition Denied Per Curiam." (Appendix F).

Neither the Commonwealth Court nor the Supreme Court of Pennsylvania considered the merits of the case. Nor did the Court of Common Pleas of Westmoreland County consider the merits of the annexation. Nor did that Court take any testimony with respect thereto.

REASONS FOR GRANTING THE WRIT

It is a violation of due process to quash an Appeal as being untimely filed when counsel for Appellant does not receive notice of the filing of the Order or a copy of the Opinion and Order until after the Appeal time has run.

The decision of the Commonwealth of Pennsylvania created a due process issue in this case. The Commonwealth Court assumed as a fact that neither counsel for Appellant, Franklin Township (Petitioner), nor Franklin Township itself received notice of the entry of the Order and Opinion of the Court of Common Pleas of Westmoreland County (Criminal Division), dated November 2, 1970, until December 21, 1970. The time for the filing of the Appeal to the Commonwealth Court expired thirty days from the date of entry of the Order and Opinion, which was filed with the Clerk of the Criminal Division of the Court of Common Pleas of Westmoreland County on November 4, 1970.

Counsel for Petitioner alleged, and it was not denied, that neither counsel for Franklin Township nor Franklin Township itself received any notice from the Clerk of the Criminal Division of the Court of Common Pleas of Westmoreland County that the Order and Opinion of November 2, 1970, had been entered (Paragraph 3, Appendix B).

The Commonwealth Court concluded, and the Supreme Court of Pennsylvania concurred, that it is not necessary

to give to counsel, or to a party itself, notice of the entry of an order from which an appeal may be taken, nor to send a copy of the order to a party or its counsel.

It is Petitioner's position that this constitutes a denial of due process.

In *Hill v. Hawes*, 320 U.S. 520, 64 S. Ct. 334, 88 L. Ed. 283; Rehearing Denied, 321 U.S. 801, 64 S. Ct. 515, the plaintiff had failed to file his appeal to the Court of Appeals for the District of Columbia within twenty days allowed by Court Rule. The Clerk of the Court had not sent to counsel a notice of the entry of judgment or dismissal. The Court of Appeals had held that the appeal was not timely because it was not filed within the time set forth in the Rule. In reversing judgment of the Court of Appeals, this Court had the following to say on page 336 of its Opinion:

> "It is true that Rule 77(d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule. The Federal Rules of Civil Procedure permit the amendment or vacation of a judgment for clerical mistakes or errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect. See Rule 60(a)(b). These rules do not in terms apply to the situation here present, as the court below held. But we think it was competent for the trial judge, in the view that the petitioner relied upon the provisions of Rule 77(d) with respect to notice, and in the exercise of a sound discretion, to vacate the former judgment and to enter

> a new judgment of which notice was sent in compliance with the rules. The term had not expired and the judgment was still within control of the trial judge for such action as was in the interest of justice to a party to the cause."

Edelman v. People of State of California, 344 U.S. 357, 73 S. Ct. 293, 97 L. Ed. 387, involves a situation where counsel for the defendant never received notice of the time an appeal would be heard in the Appellate Court of the state in which the appeal was taken. Counsel failed to present himself to the Court at the time set for argument of which he had no notice. The Appellate Court entered a default judgment which was affirmed by this Court on the ground that the petitioner had adequate state remedies which he could pursue in another proceeding. In a Dissent by Mr. Justice Black and Mr. Justice Douglas, it was held that under the circumstances a refusal to allow the petitioner to be heard in the Appellate Court deprived petitioner of due process of law as guaranteed by the Fourteenth Amendment. Mr. Justice Black made the following comments on page 297 of the Dissent:

> "The rules of the California appellate court specifically require that an appellant or his attorney of record shall be mailed notice of the date on which his appeal will be heard. California admits that no such notice was given petitioner or his counsel of record on appeal and that neither knew the case was set for hearing. As a result neither was present when the case was called in the appellate court. Consequently that court affirmed the jail sentence by default without argument or consideration of the merits of the conviction or the constitutionality of the vagrancy statute. Immediately after discovery of this default affirmance petitioner moved to vacate the action. With full knowledge of all the foregoing facts, the appellate court denied the motion. Petitioner has thus had his constitutional contentions rejected and his conviction affirmed

> without notice and an opportunity to be heard through himself or counsel. In California, the right of appeal 'is guaranteed by the Constitution to the prisoner and is as sacred as the right of trial by jury. It is one of the means the law has provided to determine the question of his guilt or innocence.' *Ex parte Hoge*, 48 Cal. 3, 6; *In re Alboria*, 95 Cal. App. 42, 50-51, 272 P. 321. Under these circumstances I agree with petitioner that refusal to give him or his counsel an opportunity to be heard in the appellate court denied him the due process of law guaranteed by the Fourteenth Amendment."

In *Scofield v. N.L.R.B.*, 394 U.S. 423, 89 S. Ct. 1154, 22 L. Ed. 2nd 385, an Opinion, dated March 5, 1968, was entered, but no decree was entered until April 16, 1968. Within ninety days of the decree, the Petition for Certiorari was docketed. Petitioners received a copy of the March 5, 1968, Opinion but were given no notice of any entry of judgment on that date. This Court held that the Petition for Certiorari was timely.

> "In our view, the petition for certiorari was timely filed. Petitioners have received a copy of the March 5 opinion, but were given no notice of any entry of judgment on that date, as would be required by Rule 36 of the new Federal Rules of Appellate Procedure, effective July 1, 1968. Since no notice was given and it could not have been clear to petitioners whether there was a March 5 judgment or not we hold, without abandoning the standard that a 'judgment for our purposes if final when the issues are adjudged' and settled with finality, *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551-552, 65 S. Ct. 770, 773, 89 L. Ed. 1171 (1945), *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212, 73 S. Ct. 245, 249, L. Ed. 245 (1952), that in this case the relevant date is that of the entry of the decree. *Cf. Rubber Co. v. Goodyear*, 6 Wall. 153, 156, 18 L. Ed. 762 (1868)."

While a state is not required to provide appellate review once an appeal procedure is established "it must be kept free of unreasoned distinctions that only impede open and equal access to the Courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310-311, 86 S. Ct. 1497, 1500. See also: *Williams v. Oklahoma City*, 395 U.S. 458, 89 S. Ct. 1818:

This Court has held that:

> "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 10.

This was the same holding in *Kramer v. Union Free School District*, 395 U.S. 621, 89 S. Ct. 1886; *Baxstrom v. Herold*, 383 U.S. 107, 86 S. Ct. 760.

This Petitioner believes that the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania have made an "unreasoned distinction" between the appellant in *Nixon v. Nixon*, 329 U.S. 256 (1938), and Petitioner and that the distinction should not prevail when measured against the test of *Williams*. There is no logical reason to conclude that in federal court proceedings notice is essential and in state court proceedings notice is not required.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,
QUINN, GENT, BUSECK
AND LEEMHUIS
JOHN G. GENT
JAMES D. McDONALD, Jr.
ROBERT G. HUHTA
Attorneys for Petitioner

Appendix A.

OPINION AND ORDER OF THE COURT OF COMMON PLEAS

BY THE COURT EN BANC:
(Opinion by David H. Weiss, P.J.)

In the within Annexation proceeding, the Township of Franklin filed an Appeal from the Ordinance of Annexation adopted by the Borough of Delmont. The Borough of Delmont, Roland S. Catarinella, Dorothy A. Catarinella, and Catranel Inc. have petitioned the Court for a Rule to Show Cause why the Appeal should not be quashed due to the failure of the Township of Franklin to comply with the security requirements of the applicable appeal statute.

The Borough Code requires, in Section 1010, that as to an appellant from an Ordinance the ". . . entering into recognizance with sufficient security to prosecute the same with effect and for the payment of costs . . . within 30 days after the enactment of any Ordinance . . ." Act of February 1, 1966, P.L. (1965) No. 581, §1010, as amended, 53 P.S. §46010. Accompanying the Appeal-Complaint filed by the Township of Franklin in this case was a recognizance executed by the Township without any surety or other security. It is the position of the petitioners that the lack of a surety constitutes a fatal defect in the appeal of the Township of Franklin. Principally cited in support of this contention is *Irwin Borough Annexation Case*, 171 Pa. Super. 256 (1952). In that case, the annexing Borough challenged whether or not appropriate bond had been filed by the Township appellant. The Superior Court was there required to interpret the Borough Code provision then in existence, which is the same, in pertinent part, as that provided in the current Borough Code. The Superior Court there stated that "sufficiently security" meant a corporate surety. We are aware that for a period of time prior to the effective date of the current Borough Code, the bonding requirement in question had been repealed by the legisla-

ture. See *Hazle Township Annexation Case*. 183 Pa. Super. 212 (1957). Since the Pennsylvania legislature has re-enacted this bonding requirement, and since the *Irwin Borough Annexation Case* has interpreted the same to require the filing of a corporate surety by a municipality to effect an Appeal from an annexation ordinance, the failure of the Township of Franklin to file the required bond within the period required by law requires this Court to quash its Appeal.

ORDER

AND NOW, to wit: this 2nd day of November, 1970, after due and careful consideration of the Petition, the Answer, the Rule issued upon the Township of Franklin to Show Cause why its Appeal should not be quashed, and the briefs and arguments of counsel therein, it is now ORDERED, ADJUDGED, AND DECREED that the Rule issued upon the Township of Franklin to Show Cause why its Appeal should not be quashed shall be and hereby is made absolute and the Petition of Borough of Delmont, Roland S. Catarinella, Dorothy A. Catarinella, and Catranel, Inc. shall be and hereby is sustained.

BY THE COURT:

/s/ DAVID H. WEISS
President Judge

CONCURRING:

/s/ L. ALEXANDER SCULCO
Judge

/s/ EARL S. KEIM
Judge

ATTEST:

/s/ R. G. BLASIOLI
Clerk of Court

Appendix B.

PETITION FOR LEAVE TO FILE APPEAL NUNC PRO TUNC

(Commonwealth Court of Pa.)

COMES NOW, the Appellant, Township of Franklin, by and through its solicitor, Henry A. Hudson, Jr., and in support of its petition for leave to file appeal nunc pro tunc, asserts:

1. On December 16, 1970 at approximately 4:00 P.M., after the Court House had closed, counsel for Appellant was advised by receipt of a brief in a companion case to the within matter, that the Court of Common Pleas of Westmoreland County, Criminal Division (Civil Docket) had entered an Opinion and Order in this matter.

2. On December 17, 1970, personal reference to the docket in this case showed that said Order was signed November 2, 1970 and filed November 4, 1970.

3. The Clerk of Court's office of the Criminal Division of the Court of Common Pleas has advised that it advised counsel for the Borough of Delmont that the Order had been entered after first advising that such had not been done. It did not notify either Appellant or its counsel of the entry of the Order.

4. On December 21, 1970, within forty-five (45) days of the entry of the Order of Court, an attempt was made to file appeal with the Prothonotary of the Superior Court but said appeal was refused because the same concerned annexation.

5. The usual practice of the Court of Common Pleas of Westmoreland County is to notify counsel of rendition of a decision either by formal notice or by forwarding a copy of the Order and Opinion to counsel.

6. Concurrently pending in the several courts of Westmoreland County are nine (9) matters involving

annexation of approximately 3,000 acres of ground within the Township of Franklin by two separate boroughs, beginning in September 1969 and continuing through April 22, 1970. Such area comprises approximately one-third of the Township. Also pending is the application of approximately 75% of the voters and landowners of the Township of Franklin (filed on October 6, 1969 before the effective date of any of the attempted annexations) for a petition to transform the Township into a borough in which the Township Board of Supervisors has concurred and is promoting.

7. Appellees cannot be prejudiced by grant of leave to file an appeal nunc pro tunc and the best interests of all the residents of the Township of Franklin would best be served by consideration of the merits of the proposed appeal.

WHEREFORE, the Township of Franklin requests the Court grant leave to the Township of Franklin to file its appeal nunc pro tunc or alternatively, consider it as having been timely filed within thirty (30) days of notice to the parties in interest of the entry of the Opinion and Order.

COSTELLO & SNYDER
By /s/ Henry A. Hudson, Jr.
Attorneys for Township of Franklin

Appendix C.

AFFIDAVIT OF HENRY A. HUDSON

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF WESTMORELAND)

BEFORE ME, the undersigned authority in and for said Commonwealth and County, personally appeared HENRY A. HUDSON, JR., Solicitor for the Township of Franklin, who, being duly sworn according to law, deposes and says that the facts set forth in the within document are true and correct to the best of his knowledge, information and belief, where the same is based upon his personal knowledge and based upon information received from sources deemed reliable where the same is not of his personal knowledge.

/s/ Henry A. Hudson, Jr.

SWORN TO and subscribed
before me this 22nd day of
December, 1970.

/s/ Dorothy M. Ficco
Notary Public

My Commission Expires: Feb. 23, 1974

Appendix D.

OPINION OF COMMONWEALTH COURT OF PA.

OPINION BY JUDGE MENCER

Filed: April 15, 1971

In September, 1969, annexation proceedings were commenced to annex approximately 80 acres of land situate in the Township of Franklin into the Borough of Delmont, both political subdivisions being in Westmoreland County. The Township of Franklin filed an appeal complaint as to the legality of the annexation ordinance under Section 1010 of the Act of February 1, 1966, P.L. (1965) —, No. 581, as amended by the Act of October 9, 1967, P.L. —, No. 181, 53 P.S. §46010. The Borough of Delmont, et al., petitioned the Court of Common Pleas of Westmoreland County for a rule to show cause why the appeal should not be quashed for the reason that the Township of Franklin had failed to enter into a recognizance with sufficient security, as required by said Section 1010 of the Act. On November 2, 1970, the lower court, by order, made the rule to show cause absolute and "quashed" the appeal complaint. This order, dated November 2, 1970, was entered and docketed in the Prothonotary's office on November 4, 1970. Fifty days thereafter, on December 24, 1970, the Township of Franklin filed this appeal, together with a petition for leave to file an appeal nunc pro tunc. The Borough of Delmont filed a reply to the petition and a motion to quash the appeal as untimely filed.

Section 502(a) of the Appellate Court Jurisdiction Act of July 31, 1970, P.L. —, P.S. §§211.101-211.510, provides: ". . . [A]n appeal under this act from any order shall be filed within thirty days of its entry." Section 510 of this Act provided for the determination of the effective date of the Appellate Court Jurisdiction Act of

1970 and, in accordance with its provisions, September 11, 1970 became the effective date. Therefore, this instant appeal is subject to the thirty day appeal period of Section 502(a).

The decisional law mandates strict compliance with statutory provisions for appeal. *Kravitz v. Zoning Board of Adjustment*, 415 Pa. 97, 202 A.2d 64 (1964); *Blank v. Board of Adjustment*, 390 Pa. 636, 136 A.2d 695 (1957). The Supreme Court of Pennsylvania indicated in the recent case of *Commonwealth v. Philadelphia Eagles, Inc.*, 437 Pa. 25, 261 A.2d 309 (1970), that it continues to insist upon such strict compliance. This conclusion is no less correct because the Eagles case dealt with the perfecting of an appeal as distinguished from the effecting of an appeal in the first instance.

The timeliness of an appeal and compliance with the statutory provisions which grant the right of appeal go to the jurisdiction of a court and its competency to act. See *Commonwealth v. Yorktowne Paper Mills, Inc.*, 419 Pa. 363, 214 A.2d 203 (1965). It is the general rule that, where an act of assembly fixes the time within which an appeal may be taken, courts have no power to extend it, or to allow the act to be done at a later day, as a matter of indulgence. Something more than mere hardship is necessary to justify an extension of time, or its equivalent, an allowance of the act nunc pro tunc. *Tuttle Unemployment Compensation Case*, 160 Pa. Superior Ct. 46, 49 A.2d 847 (1946); *Yeager v. United Natural Gas Company*, 197 Pa. Superior Ct. 25, 176 A.2d 455 (1961); *Morgan v. Pittsburgh Business Properties, Inc.*, 198 Pa. Superior Ct. 254, 181 A.2d 881 (1962). Two notable exceptions to this general rule are where there is presence of fraud or a breakdown in the court's operation to the prejudice of a party (*Nixon v. Nixon*, 329 Pa. 256, 198 A. 154 (1938); *See Christiansen v. Zoning Board of Adjustment*, 1 Pa. Commonwealth Ct. 32 (1971), or where the failure of a defendant in a criminal case to take a timely appeal is the result of an unconsti-

tutional deprivation of the assistance of counsel (*Commonwealth ex rel. Light v. Cavell*, 422 Pa. 215, 220 A.2d 883 (1966)).

In *Nixon v. Nixon*, *supra*, it was recognized that certain extraordinary circumstances might satisfactorily explain a delay in filing an appeal and failure to allow an appeal nunc pro tunc would work a grave injustice. However, the court emphasized that any such allowance must be based on extraordinary conditions and must involve fraud or some breakdown in the court's operation through a default of its officers, whereby the party has been injured. In that case, the plaintiff instituted divorce proceedings and the defendant was served by publication. The defendant did not appear and a decree in divorce was granted. A short time later, after plaintiff had remarried, the defendant petitioned to have the decree vacated on a jurisdictional question. The lower court vacated the decree and on appeal the Superior Court affirmed. The plaintiff, on appeal to the Supreme Court, shortly after the forty-five day limit then applicable for such appeals, averred that, although the custom of the Superior Court was for the Prothonotary of that Court to send notice to counsel of the entry of an order, such notice in his case was not sent. It is important to note that the Supreme Court made special reference to the fact that this averment of the plaintiff was not specifically denied by the defendant. Plaintiff further stated that he remained unaware of the decision and order of the Superior Court until the decision appeared in the Advance Reports.

The Supreme Court reviewed, at page 261, the custom of the Superior Court as follows: "Despite the fact there is no statute or written rule of court requiring the prothonotary of the Superior Court to issue notices when orders have been entered, we understand that he has customarily assumed such a duty. This practice, grown to a custom, to notify counsel of the decisions of the Supreme and Superior Courts likewise obtains in the Eastern and Western districts. Nei-

ther appellant nor his counsel knew, nor had any reason to believe, there had been a mistake in the prothonotary's office. Under the circumstances they were entitled to expect this notice. The Harrisburg District is composed of twelve counties, and the opinions on cases arising there are handed down at various places at which the court sits, usually cities other than Harrisburg. Counsel lives in Adams County, and it would impose too great a burden to require him to daily inform himself by telephone."

Because of this admitted error, not present here, the Supreme Court, in *Nixon*, allowed the appeal nunc pro tunc. However, the Court made very clear that the only reason for doing so was because the appellant contended and averred, and such averment was not denied, that an error had been committed in the prothonotary's office. The Court carefully pointed out that the controlling factor is whether the notice was sent as distinguished from the irrelevant fact of whether or not the appellant received the notice. The Court said in this regard, at page 262: "But, it must be understood that, if it appears of record that the prothonotary's office sent a postal notice, this will satisfy all requirements of the custom and cannot be disputed." In *W. W. Grainger, Inc., v. Ruth*, 192 Pa. Superior Ct. 446, 449, 161 A.2d 644, 646 (1960), the Superior Court said: "In the instant case, even if it had been properly proved, lack of knowledge or notice of the entry of the judgment by the alderman is not a sufficient reason [to permit an appeal nunc pro tunc]. *Adelman v. McShain*, 148 Pa. Superior Ct. 138, 24 A.2d 703 (1942)."

Here the Township of Franklin has not attempted to show any fraud. It has also failed to show a breakdown in the court's operations. In fact, the only thing that it does allege is that it did not receive a copy of the opinion and order filed November 4, 1970, and that hardship would result if the appeal is not allowed. Hardship alone is not a justification for the allowing of an appeal nunc pro tunc. *Tuttle Unemployment Compensation Case, supra*. Like-

wise, failure to receive notice by itself is not sufficient reason for allowing a nunc pro tunc appeal. *Nixon v. Nixon, supra.*

The burden is upon the Township of Franklin to show fraud or a breakdown in the court's operations and it has not met its burden in this case. Actually, the Borough of Delmont has offered convincing proof that, in fact, no breakdown occurred in the customary manner of providing such notices in Westmoreland County. The affidavit of the secretary of Judge Weiss indicates that she, in compliance with custom in Westmoreland Court, sent notice in this case to all counsel of record. This satisfies the criteria set forth in *Nixon v. Nixon, supra,* which we factually distinguish from the instant case.

Accordingly, the petition of the Township of Franklin for leave to file this appeal nunc pro tunc is dismissed and the motion to quash this appeal is granted.

The appeal is quashed.

/s/ GLENN E. MENCER
J.

CERTIFIED FROM THE RECORD
/s/ FRANCIS C. BARBUSH
Chief Clerk

Appendix E.

PETITION FOR ALLOWANCE OF APPEAL OR CERTIORARI FROM JUDGMENT ORDER OF THE COMMONWEALTH COURT

(Supreme Court of Pa.)

To the Honorable, the Judges of Said Court:

COMES NOW, the Township of Franklin, Appellant in the above matter by and through its Solicitor, Henry A. Hudson, Jr. of Costello & Snyder, Attorneys at Law, and in support of its Petition for Allowance, sets forth the following:

1. The question involved in the above matter is: May the Court grant leave to file an appeal nunc pro tunc or find the same to have been timely filed when such appeal was filed within ten (10) days of Notice of Entry of a final order although not within thirty (30) days of the entry of such order? (Negatived by Commonwealth Court)

2. The facts of the above matter are:

On September 25, 1969 the Borough of Delmont passed an annexation ordinance purporting to take slightly more than seventy-eight (78) acres of land from the Township of Franklin.

On October 7, 1969 an appeal was regularly filed in the Court of Common Pleas, Criminal Division, Civil Docket and a supersedeas granted. On October 21, 1969 alleging that the supersedeas was granted for delay only, the Borough requested that the supersedeas be stricken and such was done and an order was entered sustaining otherwise the previous order *including the recognizance*. On October 24, 1969 upon the Township's petition, a hearing was set for October 30, 1969 at which time the Court would consider the grant or rejection of supersedeas. At the hearing and without having filed same previously or having previously petitioned for intervention, the Court granted, over the Township's objection, an oral motion to a property owner

for intervention. Without any authority to do so the intervenor then filed an "Answer to Petition for Supersedeas and a Motion to Strike."

Then at the hearing on October 30, 1969, with the Township prepared to prove each one of the allegations alleged, the Court, without the taking of any testimony, sustained the intervenor's demurrer and refused the supersedeas.

From that refusal an appeal to Superior Court was taken and quashed as a non-appealable order (No. 72 April T. 1970) 217 Pa. S.720 (1970).

On October 15, 1970 oral argument at Court on Banc was held over the objection of counsel for the Township on a rule to show cause issued December 12, 1969 without prior notice to counsel for Appellant, there not having been filed a reply to the new matter raised in the response to the petition and rule. On November 4, 1970, an order dated November 2, 1970, was filed in the Prothonotary's office of the Court of Common Pleas and transferred on said date to the Criminal Division where the same was filed. The Solicitor for the Township of Franklin, sole counsel of record for the said Township, received notice of the existence of said order on December 16, 1970, in a brief in a separate annexation matter filed by the Borough of Delmont.

Commonwealth Court filed an Opinion, Decision and Order quashing the appeal on April 15, 1971. From that Opinion, Decision and Order this appeal is taken.

3. It is Appellant's contention that the Commonwealth Court was in error in quashing Appellant's appeal and in not allowing Appellant's appeal nunc pro tunc. Appellant's non receipt of notice of the filing of the decision of the lower court within the time allowable for appeal constituted full and complete grounds for the Commonwealth Court to allow appeal nunc pro tunc. The authorities supporting Appellant's contentions are:

(A) Acts of Assembly—Act No. 233 Approved July 31, 1970 (17 PS 211.101 to 211.510) Sec. 402(4), 502(a), 507(a), 507(b).

(B) Pennsylvania Rules of Civil Procedure Rules 126, 127, 128.

(C) Cases:

Peters Adoption Case, 176 Pa. S. 6 (1964).

Commonwealth v. Schneiderman, 162 Pa. Super. 461 (1948).

Hechman v. Waylman, 83 Pa. Super. 188 (1924).

Ifft v. Hunter, 202 Pa. Super. 487 (1964).

In re Rumsey, 135 Pa. Super. 515 (1939).

McDonnell v. Unemployment Compensation Board of Review, 173 Pa. Super. 355 (1953).

Nixon v. Nixon, 329 Pa. 256 (1938).

Taylor Motor Rental, Inc. v. Associates Discount Corp., 196 Pa. Super. 182 (1961).

Tuttle Unemployment Compensation Case, 160 Pa. Super. 46 (1946).

Von Koanel v. Unemployment Compensation Bd. of Review, 163 Pa. Super. 173 (1948).

Ward v. Letzkus, 152 Pa. 318 (1893).

Wendland v. Altoona & L. V. Elec. Ry. Co., 163 Pa. Super. 457 (1948).

Wise v. Cambridge Springs Borough, 262 Pa. 139 (1919).

W. W. Grange, Inc. v. Ruth, 192 Pa. Super. 446 (1960).

Christiansen v. Zoning Board of Adjust., at 1 Pa. Commonwealth Court, 32 (1971).

4. Attached hereto and made a part hereof are copies of the following orders of the lower court, the Superior Court and the Commonwealth Court:

(A) *Common Pleas of Westmoreland County*

(1) 9 October 1969

(2) 21 October 1969
(3) 24 October 1969
(4) 12 November 1969 (sic-12 *December* 1969)
(5) 2 November 1970 (Opinion and Order)

(B) *Superior Court*

June 4, 1970 72 April Term, 1970 217 Pa. Superior Ct. 720 (1970)

(C) *Commonwealth Court*

15 April 1971 (Opinion and Order)

WHEREFORE, Township of Franklin requests allowance of the within appeal from or certiorari to the Commonwealth Court and that the said Opinion, Decision and Order be reviewed.

/s/ Henry A. Hudson, Jr.
Henry A. Hudson, Jr., Solicitor
for the Township of Franklin
COSTELLO & SNYDER

Affidavit of Henry A. Hudson

COMES NOW, HENRY A. HUDSON, JR., Solicitor of the Township of Franklin, and after being duly sworn according to law, avers that the within Application for Certiorari is not being made for the purpose of delay but rather because the Appellant believes it has suffered unjustice by the Opinion, Decision and Order of the Commonwealth Court from which it appeals.

/s/ Henry A. Hudson, Jr.

SWORN TO and subscribed before
me this 10th day of May, 1971

/s/ Carolyn Ellis
Notary Public
(SEAL)
My Commission Expires: October 2, 1972

Appendix F.

ORDER OF SUPREME COURT OF PA.

The Supreme Court of Pennsylvania
Western District
(Letterhead)

August 10, 1971

Henry A. Hudson, Jr., Esq.
15 North Main Street
Greenburg, Pa. 15601

Re: Annexation of Portion of Township of Franklin by the Borough of Delmont No. 3 Allocatur Docket

Dear Mr. Hudson:

This is to advise you that the Court has entered the following Order on your petition for allowance of appeal from the Order of the Commonwealth Court at No. 296 C. D. 1970, in the above-captioned matter:

"July 30, 1971
Petition denied.
Per Curiam"
/s/ PATRICK N. BOLSINGER
PROTHONOTARY